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Clyde Reaveley Dba Reaveley Trucking Company v. Public Service Commission Of Utah And Hal S. Bennett, Donald Hacking And Doanld T. Adams; Line Trucking, Inc., And Uintah Freightways : Brief of Defendants

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Recommended Citation

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In the Supreme Court of the State of Utah

CLYDE REAVELEY, d/b/a
REAVELEY TRUCKING COMPANY,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH and HAL S. BENNETT, DON-
ALD HACKING, and DONALD T.
ADAMS, Commissioners of the Public
Service Commission of Utah; LINK
TRUCKING, INC., and UINTAH
FREIGHTWAYS,

Defendants.

Case No.
10909

BRIEF OF DEFENDANTS

Appeal from the Order of the Public Service Commission
of Utah

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In the Supreme Court of the State of Utah

CLYDE REAVELEY, d/b/a
REAVELEY TRUCKING COMPANY,

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vs.

PUBLIC SERVICE COMMISSION OF
UTAH and HAL S. BENNETT, DON-
ALD HACKING, and DONALD T.
ADAMS, Commissioners of the Public
Service Commission of Utah; LINK
TRUCKING, INC., and UINTAH
FREIGHTWAYS,

Defendants.

Case No.
10909

BRIEF OF DEFENDANTS

STATEMENT OF THE NATURE OF THE CASE

On complaint of Clyde Reaveley dba Reaveley Trucking Company (herein Reaveley), requesting an order suspending the effective date of a tariff publication for the transportation of bulk cement, the Public Service Commission of Utah entered into an investigation and suspension proceeding with respect to the rates and authority of Link Trucking, Inc. (herein Link) and Uintah Freightways (herein Uintah), in the transportation of cement, gilsonite, and salt in bulk.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

The Public Service Commission of Utah concluded that the terms "property and general commodities" as used in the certificates of convenience and necessity of Uintah and Link are certain and unambiguous and that said certificates, except where specifically restricted, confer authority to transport all commodities in all types of vehicles; that the investigation and suspension proceedings should be dismissed and the rates and charges set forth in the tariff publication should remain in full force and effect.

RELIEF SOUGHT ON APPEAL

Plaintiff Reaveley seeks to set aside that part of the order of the Public Service Commission insofar as it holds that Uintah and Link may transport cement in bulk. The authority of said defendants to transport bulk gilsonite, salt and other bulk items is not challenged.

STATEMENT OF FACTS

The notice of hearing Investigation Docket No. 136 orders Link and Uintah to appear and show cause why the Commission should not determine the extent of Link and Uintah's authority to handle bulk shipments of cement, gilsonite and salt and why the rates and charges

published by Link and Uintah should not be permanently suspended. The notice does not raise an issue of abandonment. (R. 495-496)

The authority of Uintah reads as follows:

“ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Uintah Freightways, be, and it is hereby issued Certificate of Convenience and Necessity No. 1288 *authorizing it to operate as a common carrier of property handling both freight and express in intrastate commerce*, as follows:

- A. 1. Between Salt Lake City, Utah and all points within the Uintah Basin over U.S. Highway 91 from Salt Lake City to Provo, thence over U.S. Highway 189 to Heber City and thence over U.S. Highway No. 40 and various Utah State and County Highways to all points within the Uintah Basin with permission to use the Orem Cut-off designated as Highway U-52 as alternate route, serving to, from and between all Uintah Basin points.
2. Between Salt Lake City, Utah, and all points within the Uintah Basin over U.S. Highway No. 40 and other various Utah State and County Highways to all points within the Uintah Basin serving to, from and between all Uintah Basin points.*
3. No local service between Salt Lake City, Utah and Provo, Utah, including Provo, be-

tween Salt Lake City and Park City, including Park City, or between Salt Lake City and Heber City, including Heber City, is authorized, except service is authorized between Salt Lake City and Heber City including both termini on both routes, on the one hand, and all points in the Uintah Basin, on the other, and service is authorized to the intermediate and off-route points of Vivian Park, Wildwood, Charleston, Daniels, Center Creek, Keetley, Midway and Hot Pots.

- B. Between Vernal, Utah, and Price, Utah, via Duchesne County, Utah, serving Vernal, Utah, and Price, Utah, and all intermediate points.
- C. Between all points in Utah authorized in A and B above, on the one hand, all points in Daggett County, Utah, on the other, over irregular routes, on call, except service to and from Daggett County points is *specifically restricted against the movement of household goods as usually defined, explosives, petroleum and petroleum products in bulk, and commodities which by reason of their sizes, shape, weight, origin, or destination require special handling and special equipment.*

*The Uintah Basin as used here is the area encompassed in Duchesne and Uintah Counties and that portion of Wasatch County in the natural drainage area of the Green River." (R. 508 5000) (Emphasis added)

Uintah's authority was first issued in the year 1926 and has since said time been enlarged and transferred through

lease and ownership. Uintah operates bulk pneumatic equipment and other bulk equipment and has handled the transportation of bulk commodities. It holds itself out as ready, able and willing to handle the transportation of all commodities tendered to it with the exception of those it is expressly excluded from handling under part C of its authority. The term "property" as used in the Uintah certificate is not ambiguous as a commodity description. Uintah has protested applications to handle the transportation of bulk commodities within the area it is authorized to serve. (R. 508-510)

Link's authority reads as follows:

"IT IS FURTHER ORDERED, that Certificate of Convenience and Necessity No. 1374 be and the same is hereby issued to Link Trucking, Inc., a corporation, *to operate as a common carrier by motor vehicle for the transportation of general commodities except acid and petroleum products, in bulk, and except commodities which by reason of their size, shape or weight require special equipment and special handling over regular and irregular routes as follows:*

To and from all points and places in Morgan, Salt Lake and Utah Counties, and the points of Heber, Helper, Price and the coal mines in Carbon and Emery Counties on the one hand, and all points in Uintah Basin, and Green Lakes the Flaming Gorge Damsite and any townsite established in connection therewith in Daggett County, on the other hand; also, to, from and between all

points in the Uintah Basin and Green Lakes, the Flaming Gorge Damsite and any townsite established in connection therewith in Daggett County, using all necessary and convenient highways, but in each instance stopping short of the Utah State Line; also the transportation of U. S. Mail and newspapers between Salt Lake City and Heber City on U.S. Highway 40.

No local service is authorized between points in Morgan, Salt Lake, Utah, Carbon and Emery Counties, or between said counties and points in Wasatch and Summit Counties, except as herein specifically authorized and all of the authority herein granted shall stop short of the Utah State Line." (R. 509-510) (Emphasis added)

The term "general commodities" as used in its certificate is not ambiguous. Link holds itself out as ready, able and willing to handle the transportation of all commodities tendered to it with the exception of those commodities expressly excluded (R. 252, 258) and has protested applications to handle the transportation of bulk commodities within the area it is authorized to serve. (R. 510)

ARGUMENT

POINT I

THE COMMISSION IS NOT BOUND BY ITS PRIOR DECISIONS IN SUBSEQUENT PROCEEDINGS INVOLVING A DIFFERENT SUBJECT MATTER, DIFFERENT FACTS AND

A CHANGE OF CIRCUMSTANCES. THE COMMISSION HAS BOTH THE PREROGATIVE AND RESPONSIBILITY OF DECIDING QUESTIONS RELATING TO THE REGULATION OF CARRIERS WITHIN THE STATE OF UTAH AND ITS DECISION THAT DEFENDANTS HOLD AUTHORITY TO TRANSPORT CEMENT IN BULK IS NOT ARBITRARY, CAPRICIOUS OR UNLAWFUL.

The defendants Uintah and Link under Point I reply to the arguments set forth under Points I through IV of plaintiff's brief.

The decisions of the Public Service Commission of Utah in the cases of *Milne Truck Line, Inc. v. Public Service Commission of Utah*, 13 Utah 2d 72, 368 P.2d 590 (1962) and *Uintah Freightways v. Public Service Commission of Utah*, 15 Utah 2d 221, 390 P.2d 238, both involving the authority of Milne Truck Line, Inc., and Uintah Freightways to handle the transportation of petroleum products in bulk are not binding upon the Commission in concluding whether or not Uintah Freightways and Link Trucking, Inc., can handle the transportation of bulk cement. In *Milne Truck Line, Inc., v. Public Service Commission of Utah*, supra, the court states:

" * * The meaning of the term 'commodities generally' must be ascertained from the particular facts of each case. * * "

The instant matter involves a different factual situation. Evidencing the fact that both Uintah and Link hold themselves out to the public as carriers of bulk commodities are Exhibits 11 through 17. Exhibits 11 and 12 are pictures of bulk equipment, including bulk pneumatic equipment operated by Uintah. Exhibits 13 through 17 are rate publications for cement, gilsonite and salt in bulk. Thomas Grua, President of Uintah Freightways testified that Uintah has handled the transportation of all bulk commodities within the scope of its existing authority including bulk cement. (R. 177-188)

The record in the instant proceeding discloses that Uintah has handled the transportation of bulk commodities such as bulk cement, bulk gilsonite and bulk milk. Likewise, the record shows that both Uintah and Link have protested applications for the transportation of bulk commodities including bulk cement, gilsonite and phosphate concentrates. (R. 173-177, 184-186)

Reaveley relies on the case of *Milve Truck Line, Inc.* supra, and asserts that under an authority containing the description of commodities generally with the addition of certain specified commodities, the further designation of commodities would be wholly unnecessary if the term "general commodities" was all inclusive. Both Link and Uintah have authorities authorizing the transportation of property and commodities generally *with certain exceptions*. The record contains numerous other similar authorities. By the same token, where the certificate

of Link and Uintah authorize the transportation of property and commodities generally without exception in certain areas but expressly exclude the transportation of certain commodities in other areas, the exclusions would be wholly unnecessary if the words "property" and "commodities generally" did not include all items except those expressly excluded.

The facts in the instant matter are not the same facts as those contained in the cases of *Milne Truck Line, Inc., v. Public Service Commission*, supra, and *Uintah Freightways v. Public Service Commission*, supra and as to any conclusions which the Commission reached in the *Milne* and *Uintah* cases, supra, the same were fully recognized by the Commission in the instant order wherein it states:

"7. The Commission has carefully and exhaustively considered the conclusions reached herein. It is mindful of its prior decisions and the decisions of the Supreme Court and their differences in *Milne Truck Lines, Inc. v. Public Service Commission of Utah*, 13 Ut. 2d 72, 368 P.2d 590 (1962) and *Uintah Freightways v. Public Service Commission of Utah*, 15 Ut. 2d 221, 390 P.2d 238 (1964), both involving petroleum, and both of which cases recognize that the Commission had the right to ascertain the meaning of the terms 'commodities generally' and 'property.' Said decisions also recognized both the right and duty of the Commission to regulate the motor carrier industry so as to afford to the public sufficient economical and satisfactory service and to fully advise shippers and the carriers as to the scope and

extent of operating authorities. These cases should be confined to the peculiar facts of each case, and should not hereafter be viewed as a precedent for interpretation of the general commodity type of certificate. Unless the interpretative rule, stated above obtains, confusion as to the meaning of certificates will lead to instability and uncertainty in the motor carrier industry to the ultimate detriment of the shipping public."

Contrary to the broad assertions of Reaveley in his brief, issues of convenience and necessity are not involved.

In the case of *York Transportation Company v. Railroad Commission of Texas*, 315 S.W.2d 313, appellants argue that the Commission is bound by its prior positions. In this case the court quotes from the case of *Magnolia Petroleum Co. v. New Process Production Co.*, and states as follows:

"* * * 'If conditions change, rights change, and the governing statutes place the matter of ascertaining such rights and determining the facts relating thereto in the first instance under the jurisdiction of the Railroad Commission.' *Magnolia Petroleum Co. v. New Process Production Co.*, 129 Tex. 617, 104 S.W.2d 1106, 1111.

(5) New and substantial evidence was heard by the Commission as to commodities included within the term 'petroleum products.' For which reason prior action of the Commission cannot be given the effect of *res judicata*. *City of McAllen*

v. Morris, Tex. Civ. App., 217 S.W. 2d 875, *er. ref.* For the same reasons the doctrine of stare decisis and equitable estoppel do not apply. 73 C.J.S. Public Administrative Bodies and Procedure § 148, p. 482."

In 73 C.J.S. Public Administrative Bodies and Procedure, paragraph 148, it is stated:

"The doctrine of stare decisis, discussed generally in Courts § 186-216, is not generally applicable to the decisions of administrative tribunals; nor does a prior administrative determination ordinarily preclude a subsequent one on the grounds of equitable estoppel. Accordingly, administrative bodies are not ordinarily bound by their prior determinations or the principles or policies on which they are based. However, prior determinations are entitled to great weight, as discussed *supra* § 144, and radical departures from administrative interpretation consistently followed cannot be made except for most cogent reasons."

The reasons as explicitly outlined by the Commission in its Report and Order are cogent.

When the Commission in the year 1964 undertook to interpret the authority of Uintah, notwithstanding its lack of uncertainty and contrary to the well-established rule set forth in the cases of *Peterson v. Public Service Commission of Utah et al.*, 1 Utah 2d 324, 266 P.2d 497, and *W. S. Hatch Co. v. Public Service Commission et al.*, 277 P.2d 809, it obviously did not anticipate the resulting

confusion. In *Peterson v. Public Service Commission of Utah, et al.*, supra, the court held:

“Unless there is some uncertainty or ambiguity, there is no basis for interpretation or clarification of the certificate. If it were permissible to go back of the language and contradict its plain terms, intolerable confusion and uncertainty would exist with regard to operating rights.”

The uncertainty and confusion became apparent to the Commission when the authority of Uintah and Link to handle the transportation of bulk gilsonite, salt and cement was challenged. Recognizing that an interpretation of said authorities contrary to their plain unambiguous meaning opens the door to every carrier holding authority to handle the transportation of a specific commodity, regardless of the evidence supporting the obtaining of the authority, and how the authority was obtained, to challenge the right of Uintah, Link and other general commodity carriers to handle the transportation of said product, thus rendering the certificates of general commodity carriers innocuous; and after considerable thought and deliberation, the Commission thus came to the following conclusions:

“5. The certificates of Link and Uintah use the terms ‘general commodities’ and ‘property’ respectively, which have the same meaning. Such terms are not ambiguous as a commodity description.

6. For many years following the enactment of the general utility law of Utah in 1917, as supplemented by the Motor Vehicle Transportation Act of 1935, it was assumed that a general commodity carrier, whose certificate was without exceptions, was authorized to transport any commodity in any type of vehicle. In its interpretation of operating authorities, the Commission has confined questions of certificate meaning to the specific language of the certificate, absent ambiguity, and such basis of interpretation has been improved by the Supreme Court of Utah in such cases as *W. S. Hatch Co. v. Public Service Commission, et. al.*, 277 P.2d 809 (1954).

The operating authority of Utah carriers is a foundation of the motor carrier industry, and it is essential to the carriers and the shipping public that there be a reasonable stability in the meaning and method of interpretation of operating authorities. Where no ambiguity exists, reference to extraneous matters such as conditions existing at the time of the grant of authority, or records of the Commission in totally unrelated proceedings, can well result in needless confusion and uncertainty as to the meaning of such certificates.

8. * * * The terms 'commodities generally,' 'general commodities,' 'property' and 'freight' set forth in certificate of convenience and necessity authorize the transportation of any commodity in any type of vehicle, subject to any restrictions which may be specifically set forth in the certificate." (R. 511-512)

Both Uintah and Link have actively solicited the transportation of bulk cement within the scope of their

certificates; have bulk equipment, including bulk pneumatic equipment, available for the transportation of bulk cement and have handled any and all bulk traffic tendered to them.

The Commission recognized that a further dilution of the authorities of Link and Uintah in light of the plain and unambiguous terms of their certificates would jeopardize their ability to maintain the necessary equipment and service in order to adequately serve the shipping public. It now recognizes that to allow so-called specialized carriers who, due to some claimed unique type of service claimed to be needed by a supporting shipper and who, as a result thereof, gain a certificate when there already exists general commodity authority held by carriers who have made substantial investments and relied upon the general language of their certificates, to now come in and attempt to carve out from the certificate of general commodity carriers, a particular product, constitutes the beginning of the end of the general commodity carrier. Likewise it substantially jeopardizes the investment made by the general commodity carrier. It requires it to apply to the Public Service Commission for authority each time a commodity which has not heretofore been moving in its territory, is tendered for transportation.

If the Commission had adopted the philosophy proposed by Reaveley in Point II of his brief, a person seek-

ing general commodity authority would be required to present evidence disclosing a need for the transportation of each and every article of commerce—an impossible task.

POINT II

ABANDONMENT WAS NOT AN ISSUE IN THE INSTANT PROCEEDINGS AND THE FACTS DO NOT SUPPORT THE CLAIM OF ABANDONMENT.

The Commission found:

“9. The Commission under 56-6-20 *Utah Code Annotated*, 1953 as amended, for good cause after notice and hearing may suspend, alter, amend or revoke any certificate, permit or license. The statute is invoked by the Commission in the event of violations, dormancy or abandonment. *These issues are not involved in this proceeding and the evidence would not support an amendment or an alteration to the certificates of Link or Uintah on this basis.*” (Emphasis added)

The notice of hearing states:

“NOW, THEREFORE, IT IS HEREBY ORDERED, that the Commission upon the petitions referred to, and its own motion, enter into an investigation with respect to the rates and authority of Link Trucking, Inc., and Uintah Freightways in the transportation of cement, gilsonite, and salt in bulk intrastate in Utah.

IT IS FURTHER ORDERED, that Link Trucking, Inc., and Uintah Freightways be and are hereby made respondents to this proceeding and that said parties appear and show cause, if any there be, why the Commission should not make a determination as to the extent of Link Trucking, Inc., and Uintah Freightways' authority to haul bulk shipments of cement, gilsonite and salt intrastate in Utah, why said rates and charges should not be permanently suspended and why the Commission should not take such other and further action as allowed by law and that a hearing for that purpose be held before the Public Service Commission of Utah at its office, 1118 First Security Bank Building, 405 South Main Street, Salt Lake City, Utah, on *Monday the 23rd day of August 1965, commencing at 10:00 o'clock.*"

Section 54-6-20, *Utah Code Annotated*, 1953, contemplates the revocation of a certificate *after notice* and hearing. The revocation, suspension, alteration or amendment of the certificate of Uintah and Link in this proceeding would be contrary to the statute and contrary to the law. *Morris v. Public Service Commission*, 7 Utah 2d 167, 321 P.2d 644. It is apparent from the notice that the purpose of the hearing is to construe the meaning of an authority and the suspension of a rate. This is not an abandonment proceeding.

The record in the instant matter is directly contrary to the claim of Reaveley that Uintah and Link have abandoned their authority to render a service in the transportation of cement in bulk or have otherwise failed to ren-

der a reasonable, adequate and continuous service in connection with said product.

Abandonment is defined by *Ballentine Law Dictionary* as the voluntary relinquishment of the possession of a thing by the owner with the intention of terminating his ownership but without vesting it in another person. The mere fact of an interruption in operations does not automatically revoke a certificate. The continuous holding out to perform the service, whether or not any shipments are available is inconsistent with abandonment. Discontinuance of service due to lack of available customers is not an abandonment. To constitute an abandonment there must be some clear and unmistakable, affirmative set or series of acts indicating a purpose to repudiate ownership. See *Ballentine Law Dictionary*; *Sven J. Johanson et al., dba Johanson Carbic Oilfield Trucking & Moving*, Application No. 16645, Permit No. B-3566, Public Utilities Reports, Volume 3, Pur. 3d 1960, page 520; *Quaker City Bus Line-Pur-Blackhawk Line*, MC-F 1546, 38 MCC 603; *Charlton Bros. Transportation Co., Inc.* - Pur-Rogers, MC-F-1864, 39 MCC 610; *Beef River Valley Telephone Co.*, 2 U-989, Certificate of Convenience and Necessity 54, Volume 16, Public Utilities Reports, New Series 1937, page 361.

The record unquestionably discloses that all traffic tendered to Uintah and Link has been handled by them. It discloses that there has been a very limited amount

of traffic or no traffic moving in the area which Uintah and Link are presently authorized to serve in connection with bulk cement. It discloses active solicitation on the part of Uintah and Link for the transportation of all articles of commerce, including bulk cement. It discloses that Uintah has bulk pneumatic equipment and other equipment capable of transporting bulk cement. This does not show a voluntary relinquishment of possession with the intention of abandonment.

Reaveley relies on the case of *R. D. Fowler Motor Lines, Inc., v. Colonial Motor Freight Lines, Inc.* MCC 382, cited October 6, 1944, 4 FCC 30,840, page 312, in support of the proposition that the Interstate Commerce Commission has found that a carrier who did not maintain reasonable and adequate service had abandoned authority and should have its certificate cancelled. In this case the carrier closed its terminals, removed its office furniture and telephones, discharged its agents, removed its pickup trucks, announced to the public the discontinuance of service in that region and referred shippers to other carriers that operated over the same routes. With such action, the Commission held that it is insufficient to continue the publication of rates and hold out to the public as a motor carrier to the best of one's ability with available equipment without accompaniment of actual operations to such an extent as to continue a bona fide continuous and adequate service.

The record in the instant matter will not support the factual premise relied upon by Reaveley in the *R. D. Fowler Motor Lines, Inc., v. Colonial Motor Freight Lines, Inc.*, case, *supra*, and in fact, is to the contrary. The facts in the instant proceeding will not support a claim of abandonment and as the Commission states:

“* * * These issues (abandonment) are not involved in this proceeding and the evidence would not support an amendment or an alteration to the certificates of Link or Uintah on this basis.” (R. 512)

CONCLUSION

This matter is of substantial importance to a successful operation by Link and Uintah; to the administration of the Public Utilities Acts and to the carrier industry.

Extensive briefs were filed by all parties to the proceeding, which said briefs are a part of the record. The matter was submitted to the Commission seventeen months prior to its rendering a decision. As its order indicates, the matter was fully considered from the standpoint of effective utility regulation and the cases of *Milne Truck Line, Inc.*, and *Uintah Freightways, supra*, here analyzed.

The findings, conclusions and order of the Commission are not inconsistent with the above cited cases and

adhere to the premise laid down by the court in the cases of *W. S. Hatch Co. v. Public Service Commission of Utah*, supra, *Peterson v. Public Commission of Utah*, supra, and others. The decision of the Commission is not arbitrary or capricious and the Commission did not act contrary to its duty or in excess of its authority.

Dated at Salt Lake City, Utah, August 22, 1967.

Respectfully submitted,

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